

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6033

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-6033

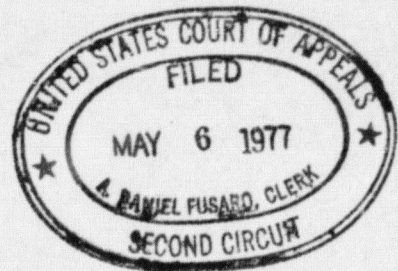
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff-Appellee,

v.

AMERICAN EXPRESS COMPANY,

Defendant-Appellant.



On Appeal from an Order
of the United States District Court
for the Southern District of New York

BRIEF FOR THE UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS APPELLEE

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BRIEF FOR THE UNITED STATES
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ISSUE PRESENTED

Whether a charging party's acceptance of a
settlement of a private suit precludes the Equal
Employment Opportunity Commission from filing a suit
to redress general discriminatory practices by the
company uncovered during investigation of the charge.

STATEMENT OF THE CASE

This appeal is from an interlocutory order entered on January 10, 1977, and amended on January 13, 1977, by the United States District Court for the Southern District of New York (Judge Gerard L. Geottel) in an action initially brought against American Express by the Equal Employment Opportunity Commission pursuant to Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(1) (Supp. V, 1975).

The complaint, alleging that the Company has engaged in diverse discriminatory practices against its employees because of their race, sex and national origin, arose out of charges filed by two former employees of the Company. So far as relevant in this appeal, Defendant-Appellant's motion to dismiss the complaint was based on the grounds that much of the complaint was founded on the charge of a Mr. Ferrell, who had brought and settled his private claim before the Commission suit was filed.

The Company's motion for certification of the issues under 28 U.S.C. §1292(b) (1970) was denied from the bench on February 14, 1977. The notice

of appeal was filed by the Company on February 15,
^{1/}
1977.

STATEMENT OF FACTS

Clarence Ferrell, a former employee of American Express Company, filed a charge with the Commission on June 14, 1971 [A. 14a]^{2/} alleging discriminatory treatment in the terms and conditions of his employment, which finally resulted in his discharge. The Commission investigated Mr. Ferrell's charge and, on January 17, 1973, issued a reasonable cause determination based on facts uncovered by the investigation [A. 16a-19a]. The reasonable cause decision found systemic discrimination by the company on the basis of race and national origin. Conciliation efforts were initiated by the Commission with the Company.

^{1/} The Commission's motion to dismiss this appeal on the grounds that the lower court's order was not a "final decision" within the meaning of 28 U.S.C. §1291 is still pending. Consideration of the motion has been deferred to the argument on the merits.

^{2/} The charge was amended on April 25, 1972 [A. 15a].

By letter, Ferrell was informed that conciliation efforts had failed and that he could request his notice of right to sue. Ferrell did so, receiving it sometime after July 3, 1973 [A. 20a]. He instituted a private, non-class action on September 20, 1973, [A. 21a-25a] seeking only individual relief for his allegedly wrongful discharge and mistreatment.

After the Commission failed in its efforts to achieve a voluntary settlement of the issues uncovered in the investigation and addressed in the reasonable cause decision, the entire file was forwarded to the Commission's Philadelphia Litigation Center for consideration of a possible enforcement action. A proposed complaint based on the Ferrell charge was sent to the Company on January 15, 1974, [S.A. 1-5] less than four months after the Ferrell complaint had been filed and seven months before issue was joined in the Ferrell action [A. 32a-38a]. The Company's motion to dismiss the Ferrell suit was not resolved against it until July 15, 1974. Ferrell v. American Express Co., ___ F.Supp. ___, 8 FEP Cases 521 (E.D. N.Y. 1974).

A second charge against American Express was filed by Mary Reese on March 14, 1972, in the Washington District Office of the Commission. It was investigated

and a reasonable cause determination was issued [A. 41a]. The Commission's efforts to conciliate with the Company on the issues addressed in that reasonable cause determination failed, and the Company was so notified by registered mail on or about March 1, 1974 [S.A. 6]. The Company requested the Commission to reenter conciliation on the Reese charge [S.A. 7-8, letter dated March 11, 1974]. Conciliation discussions on the class issues arising out of the Ferrell charge were still in progress at that time. The Company made a consolidated proposal for settlement, as indicated by the letter of the Company's counsel dated April 9, 1974 [S.A. 10].

The complaint that the Commission proposed to file if conciliations again failed was revised to reflect the consolidation of the charges [S.A. 12-15]. This complaint, identical to the one eventually filed by the Commission, was sent to the Company on November 27, 1974 [S.A. 11]. Negotiations continued throughout 1975, but finally broke down. This action was filed on January 21, 1976 [A. 1a].

During that period, the Company answered the Ferrell complaint on August 23, 1974 [A. 32a-38a]. Prior to a trial on the merits, the Company and Ferrell

entered into a settlement. The private action was then terminated with prejudice on May 5, 1975 [A. 39a].

ARGUMENT

I

THE TERMINATION OF THE CHARGING PARTY'S PERSONAL SUIT DID NOT ERADICATE THE COMMISSION'S RIGHT TO BRING A SUIT IN THE PUBLIC INTEREST TO ELIMINATE DISCRIMINATORY PRACTICES UNCOVERED DURING THE INVESTIGATION OF THE CHARGE.

The question presented by this appeal is whether the Equal Employment Opportunity Commission is precluded from bringing an action to redress wide spread, systemic employment discrimination by the fact that the private party, whose charge led to the investigation which revealed the practices, had brought suit and settled his own individual grievance. The Commission's position, which is supported by the majority of circuits which have had occasion to pass on the issue,^{3/} is that,

3/ EEOC v. North Hills Passavant Hospital, 544 F.2d 664 (3rd Cir. 1976); EEOC v. Kimberly-Clark Corp. 511 F.2d 1352 (6th Cir.), certiorari denied, 423 U.S. 944 (1975); EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975); EEOC v. Huttig Sash and Door Co.,

(Footnote continued)

whatever may be the situation where the private and Commission suits are truly duplicative, the fact that a private party has brought and even concluded a suit on an individual claim does not bar the Commission from suing to redress the other discriminatory practices which have been uncovered during the investigation of the charge.

A. The Commission's Statutory Power to Sue Cannot Be Inhibited by the Action of a Private Party.

Since the 1972 amendments to Title VII, conferring on the Commission the right to bring suits in its own name, Section 706(f)(1) (Attachments, infra) creates two separate and distinct rights of action, one in the Commission and one in the person or persons aggrieved. Even though the separate rights of action

^{3/} 511 F.2d 453 (5th Cir. 1975).

As we discussed infra, the only clearly contrary decision is the 10th Circuit opinion in EEOC v. Continental Oil Co., 548 F.2d 884 (1977).

may have originated from the same charge, the two causes of action are separate, not only with respect to the parties, but as to the interests involved.

EEOC v. Kimberly Clark Corp., 511 F.2d 1352 (6th Cir. 1975); EEOC v. General Electric Co., 532 F.2d 359, 364-66 (4th Cir. 1976); EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297 (3rd Cir. 1976).^{4/} The difference between private and public suits even when they deal with the same subject matter has long been recognized. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538-39 (1972); United States v. Borden, 347 U.S. 514, 518-19 (1954) (anti trust proceeding where the Court pointed out that "the government's right and duty to seek an injunction to protect the public interest exists without regard to any private suit or decree"). This Court has held in the

^{4/} As the 3rd Circuit there said, 516 F.2d at 1299:

When EEOC institutes a civil action it does so not only in the interest of the charging party, but also in the public interest, as a federal agency charged with enforcing the Congressional policy against discriminatory employment practices.

context of a suit to bar employment discrimination that a consent decree obtained by the Department of Justice does not bind private parties. Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972) certiorari denied, 411 U.S. 931 (1973). See to the same effect Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 65 (5th Cir. 1974) certiorari granted, 96 S.Ct. 2200 (1976). Equally, a private party suit cannot bind the government.

The fact that a Commission law suit under Section 706(f)(1) arises out of a charge does not render inapplicable the basic principles discussed above. While it is undisputed that a charge is a necessary prerequisite to an action under Section 706(f)(1), it has long been established that the charge is merely a trigger for Commission investigation and conciliation which is not limited to the four corners of the charge. Hence, the charge does not limit the scope of the suit which the Commission may ultimately bring. EEOC v. General Electric Co., supra, 532 F.2d at 372. Once the charge has given rise to the process by which the Commission investigates and conciliates and ultimately brings suit, the Commission suit in the public interest should not be defeated by action or inaction of the private party.

It was established early, in Sanchez v. Standard Brands, Inc., 431 F.2d 455, (5th Cir. 1970), that the "purpose of a charge of discrimination is to trigger the investigatory and conciliatory processes of the EEOC." That decision and decisions in other circuits also held that, when a charge is filed, the Commission may, and should, investigate all matters like and related to and growing out of the charge. See, e.g. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970). As the Sixth Circuit said in Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969), in relation to a demand for evidence under the 1964 Act:

Moreover, evidence concerning employment practices other than those specifically charged by complainants may properly be considered by the Commission in framing a remedy. Title VII of the Civil Rights Act of 1964 should not be construed narrowly, and the Commission may, in the public interest, provide relief which goes beyond the limited interest of the charging parties. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); King v. Georgia Power Co., 295 F.Supp. 943 (N.D. Ga. 1968).

See also Graniteville Co. (Sibley Div.) v. EEOC, 438 F.2d 32, 42 (4th Cir. 1971). In light of this recognition, even before the 1972 amendments, of the role of the Commission in protecting and furthering a public interest far more pervasive than the interest of the individuals invoking the process,^{5/} it is evident that when Congress gave the Commission separate enforcement powers, it did not intend to have the Commission's authority to bring suit depend upon what the private party did or did not do (especially where very substantial public resources have been expended on preliminaries to the exercise of that authority).

^{5/} As noted in the final Section-by-Section analysis submitted by the Chairmen of the Conference Committee of the House and Senate, 118 Cong. Rec. 7168 (1972); Legislative History of the Equal Employment Opportunity Act of 1972, Committee on Labor, 92d Cong., 2d Sess. (hereinafter, Legislative History) 1847: "The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant."

Even with respect to a private class action, a ruling against the charging party's personal claim does not bar consideration of the claims for class relief against more general discriminatory practices uncovered during investigation of the charge. Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 428 (8th Cir. 1970). Still less should the failure or settlement of the charging party's claim bar a Commission suit to eradicate the discriminatory practices uncovered by the investigation.

Congress intended the Commission to be the prime enforcer of Title VII.^{6/} The position urged by appellant would defeat that purpose.

6/ Williams' Section by Section Analysis of the final Senate version of the bill, 118 Cong. Rec. 4941; Legislative History, 1771 states:

The procedures set forth in this subsection are intended to place the primary responsibility for enforcing violations of Title VII in the Commission and to shift them from the private plaintiff where they have been under the existing provisions of Title VII.

B. Neither the Language Nor the Legislative History Support the View that a Limited Private Suit Precludes the Commission from Bringing a Suit in the Public Interest.

As the Third Circuit pointed out in EEOC v. North Hills Passavant Hospital, supra, 544 F.2d at p. 668: "Nowhere in §706(f)(1) is there any explicit qualification of the EEOC's general authority to sue as granted in the first section of the statute." A prohibition against duplicative suits has been implied from the legislative history and from the permissive powers of intervention in private party actions conferred in another part of Section 706(f)(1). Neither supports the claim that, as in proceedings which are not duplicative in fact (i.e. where the private suit is narrow and the Commission suit broad), the action of the private party should preclude a Commission suit.

1. Legislative history

In the proceedings leading to the 1972 amendments, both houses of Congress entertained bills that provided the Commission with cease-and-desist authority such as that given to the National Labor Relations Board but also retained the private right of action established under the 1964 Act.^{7/} S. 2515, the cease-

^{7/} S. 2515, 92nd Cong., 1st Sess. (1971); H.R. 1746, 92nd Cong., 1st Sess. (1971). See, Legislative History, 1-29, 157-187.

and-desist enforcement bill which was ultimately rejected, specifically provided for termination of Commission action (except for intervention) upon the filing of a civil action by the person or persons aggrieved (proposed Section 706(q)(1), S. Rep. No. 92-415, 92d Cong. 1st Sess., pp. 47-48 (1971), Legislative History pp. 390-391), and the termination of the right of an aggrieved person to bring a civil action upon issuance of a Commission complaint (proposed Section 706(q)(2), id., p. 392).

It was while Congress contemplated this scheme of enforcement that all but one of the statements about the avoidance of duplicative proceedings was entered into the Congressional Record. Clearly, an agency with cease-and-desist authority could easily duplicate the proceeding of a district court, e.g., issuing injunctions, if no safeguards were established. Different considerations are necessarily involved, however, in dealing with conflicts between administrative and judicial proceedings than are involved in public and private civil litigation.

No such provisions like those referred to above were contained in the court enforcement proposal

which became law. This strongly suggests that Congress was concerned with duplicative proceedings only as long as the Commission was to be granted cease-and-desist authority, i.e. as long as there was potential conflict between administrative and judicial proceedings. The only reference to duplicative proceedings after both Houses of Congress eliminated consideration of cease-and-desist authority is in a Section-by-Section Analysis of S. 2515 submitted by Senator Williams at 118 Cong. Rec. 4942 (1972); Legislative History, p. 1772. This analysis accompanied the final Senate version of the bill but was eliminated from the Section-by-Section Analysis that Senator Williams submitted with the Conference version of the bill adopted into law, found in S. Rep. No. 92-681, 92d Cong., 2d Sess. (1972); Legislative History, pp. 1800-42. The alteration in the bill altered Congressional concern with duplicative proceedings.

It is also significant that, when faced with Sen. Hruska's amendment (Admt. No. 877, id., p. 1382) making Title VII the exclusive remedy for employment discrimination and thus eliminating duplicative

proceedings in other forums and under different statutes, Congress rejected it. Id., p. 1407.

Throughout debate on the amendments opponents noted the purpose of the new legislation was to strengthen the civil rights law by giving the Commission new power, and by the use of "all available resources," for relief. Statement of Senator Williams, id., p. 1405. See also Statement of Senator Javits, id., p. 1400.

The legislative history thus affords no support for appellant's position.

2. The Right of Intervention

The greatest reliance for the proposition that Congress intended to allow only one suit on a charge, no matter how divergent the matters alleged, stems from the provision in Section 706(f)(1) which grants the Commission authority to seek to intervene in a private suit on the filing of a certificate of public importance. We suggest that, far from supporting appellant's position, this provision, considered in the light of the statutory scheme, indicates that Congress did not intend the Commission to be barred from bringing a suit in the public interest by the fact that a private party has brought a narrow suit on a particular charge.

Congress preserved the right of private action because it was aware that the Commission's backlog resulted in delays of several years in the completion of the administrative process, including attempts at conciliation, which must be completed before the Commission may sue.^{8/} It therefore provided that, 180 days after the filing of a charge, a private party, who is able to do so, may bring a private suit.^{9/} In many cases, this means that the private party may institute a suit before the Commission has completed its process of investigation and conciliation and is thus not yet in a position to sue. Yet, a private party suit, particularly if broadly based, may, in a practical sense, seriously affect the Commission's ability to enforce the public interest with respect to the same employer. The right of intervention gives the Commission a basis for protecting the public interest against any such possible result. It is significant that Congress required an application for intervention to be based on a certificate of public importance. Clearly, Congress did not expect and did not wish the Commission to be

8/ 118. Cong. Rec. 7168 (1972); Legislative History 1847.

9/ Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (Supp. V, 1975).

involved in every suit which might concern only a minor, individual grievance. It did want the Commission to be able to participate in important cases which might affect the public interest.

The right of intervention in a private suit may be an adequate substitute for a Commission suit where the private party suit is roughly equivalent in scope to the suit which the Commission could bring on the basis of the charge filed. It is not a reasonable alternative to a Commission suit where the private party suit is a narrow one addressed only to the individual charging party's individual grievance. The facts of this case are a very good illustration of the reason why this is so. In this case, in contrast to many which are brought before the Commission's administrative process has been completed, the private party suit was filed after the investigation and reasonable cause determination had revealed the existence of discriminatory practices affecting the company's general employment policies.^{10/} Yet, the private law suit was a very narrow one, relating only

^{10/} If a private suit is filed before completion of the Commission's investigation, the Commission cannot even be certain whether important issues are involved, unless the private suit is a class suit making broad allegations.

to the private party's individual grievances. That suit in itself was not a matter of public importance. The Commission would have been justified in intervening in the suit only if it could have expanded the causes to include all the matters alleged in the present suit. Aside from the particular situation here, where it would have been inappropriate for the Commission to seek to intervene while the Company was apparently attempting in good faith to conciliate all issues, any attempt to encompass in the Ferrell suit all the matters alleged in the present suit (even without regard to the other charge on which this suit is founded) would not be likely to succeed. The discretion of a district court in determining what additional claims may be asserted by an intervenor is very broad. See Wright & Miller, Federal Practice and Procedure, Civil §1921; 3B Moore's Federal Practice ¶24.10[4] (1974). Where an individual has filed a charge which could or does lead to a far-reaching investigation, but chooses to bring a very limited action primarily seeking relief for himself, a court might well deny the Commission as intervenor permission to file a broad complaint. Moreover, the charging party could well feel that

he should not be obliged to have his individual grievance, which may not involve broad issues, intermingled with and delayed by the broad Commission suit.

While we do not dispute the Company's good faith in requesting further conciliation when it was informed that the Commission contemplated suit on the Ferrell charge, the facts of this case do illustrate the dangers to the public interest that would stem from a ruling that, once the charging party has filed a private suit, the Commission is relegated only to a permissive right to intervention, no matter how narrow the suit or how broad the public wrong alleged by the Commission. If the Commission has only the right to intervene, it could not, at its peril, accede to the most sincere attempts of a company to settle the matter without suit, since to do so would jeopardize its chances of making a timely motion for intervention and, if the case were settled in the meantime, would preclude it forever from bringing suit. This is not in keeping with the general philosophy of Title VII to resolve disputes by conciliation whenever possible.

In general, if the mere bringing of a private suit, of which the Commission may not always be aware, will preclude the Commission from filing suit, there is created a ready and relatively inexpensive method by which recalcitrant companies can avoid liability under Title VII. Settlement of an individual claim which has been brought to suit would preclude the claims which the Commission could assert on behalf of all other injured minorities. The Tenth Circuit in Equal Employment Opportunity Commission v. Continental Oil Company, 548 F.2d 884 (10th Cir. 1977) thought that this was not an undesirable result since the Commission could always file new charges. Not only would this result in still further delay while any new charges would be investigated, but it would cut off restitution for those who suffered injury more than two years before the filing of any new charge. This is not in accord with the twin statutory objectives of Title VII of eliminating employment discrimination and making whole the victims thereof, Albemarle Paper Co. v. Moody, 422 U.S. 405 416-21 (1975). The proper view, we submit is that stated in EEOC v. Kimberly-Clark Corp., supra, 511 F.2d at 1363:

Congress meant to prevent duplicitous proceedings by limiting the EEOC to the right of permissive intervention in a private action when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief other than for the private party. The Congressional intent that duplicitous proceedings be avoided does not mean, however, that the EEOC should be limited to permissive intervention in a private suit when its investigation on the one charge has disclosed a number of violations which require judicial attention.... Indeed allowing the EEOC to assert its own cause of action alleging racial discrimination furthers the basic purpose of the 1972 amendments to give the EEOC authority to prevent violations of Title VII. (Emphasis supplied)

See also EEOC v. Huttig Sash, supra, 511 F.2d at 455 where the Fifth Circuit said:

We are convinced that Congress meant to avoid duplicative proceedings by limiting the EEOC to permissive intervention when the EEOC raises no substantially different issues and seeks no relief other than for the private party. An entirely different situation exists when the EEOC uses the filing of a charge simply as a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices; this investigation might frequently disclose, as in this instance, illegal practices other than those listed in the charge.

C. The Weight of Authority Supports The Commission's Position

As noted at the outset the Third, Fifth and Sixth Circuits have adopted the view that filing of

a narrow private suit does not bar the Commission from filing, in the public interest, a broader suit addressing other forms of discrimination uncovered during investigation of the private party's charge.

The Eighth Circuit appeared to have taken a contrary position in EEOC v. Missouri Pacific Railroad Co., 493 F.2d 71 (1974) in the situation where the private party had filed a class action which was pending when the Commission filed its own suit making broader allegations than the private class suit.^{11/} A more recent decision of that circuit, however, casts doubt on whether the Missouri Pacific rule applies to the situation here presented.

In McClain v. Wagner Electric Co., _____ F.2d _____, 14 FEP Cases 817, 819, 13 EPD ¶11,563, p.7029 (8th Cir. 1977) the court stated:

If a private suit by an employee or employees is instituted prior to the

^{11/} The Missouri Pacific decision did indicate that the Commission, in intervening, should be allowed to broaden the scope of the action to encompass whatever broad based allegations the Commission deemed it appropriate to assert. We believe, as do the other courts that have considered the issue (see infra p. 21-2), that this is an inappropriate method of conserving judicial resources where the individual suit is narrow and the Commission suit is broad based.

filing of a suit by the Commission, the Commission's remedy is limited to permissive intervention under Rule 24(b) in the employee's suit, at least where the claims asserted by the Commission are no broader than those set out in the employees' suit.

The footnote to that paragraph reads:

A different result has been reached in cases in which the claims of the Commission are broader than those of the employees who filed the initial suit. See EEOC v. McLean Trucking Co., 525 F.2d 1007, 11 FEP Cases 833 (6th Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 10 FEP Cases 38 (6th Cir. 1975); EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 10 FEP Cases 529 (5th Cir. 1975).

The Ninth Circuit opinion in EEOC v. Pacific Press Publishing Association, 535 F.2d 1182 (1976), which appellant cites as a decision in its favor, does not deal at all with the situation here involved. In that case, private parties, one of whom had brought an action to redress discrimination, claimed that they had been discharged in retaliation for bringing the law suit. Finding cause to believe that the discharge was indeed retaliatory, the Commission sought, under Section 706(f)(2), a temporary restraining order against the discharge. The Ninth Circuit held that since the private parties could have sought relief in the private party action, the district court should not have granted temporary relief in

the separate Commission action under Section 706(f) (2). It pointed out that the relief envisaged in Section 706(f)(2) was "in aid of the EEOC's administrative process" which was not implicated in the proceeding for the temporary restraining order in view of the private suit on the merits.

That leaves the decision of the Tenth Circuit in EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977) as the only decision squarely contrary to the ruling below. That opinion in a large measure was influenced by that circuit's view that the Commission's responsibilities under §706 are "addressed to individual instances of employment discrimination" as distinguished from the right to attack broad patterns under §707 of the Act.^{12/} This represents an unduly narrow view of the scope of a Section 706 suit. As noted above (§I.A.), it is well established that the Commission, in suing under Section 706, may seek relief, monetary and injunctive, for large groups of employees on the basis of a single charge. Even prior to the 1972 amendments to Title VII, before the Commission had the power to initiate suits, the courts had made it clear, in the context of private suits, that relief under the Title could be obtained for whole classes

^{12/} 42 U.S.C. §2000e-6 (Supp. V, 1975). See attachments, p. 33.

of similarly situated employees, based on a single charge. Oatis v. Crown Zellerbach, 398 F.2d 496 (5th Cir. 1968). See Rich v. Martin Marietta Co., 522 F.2d 333 (10th Cir. 1975). The rationale for allowing class wide suits without multiple charges is obvious-- it would be inefficient to require the Commission, having already processed one charge and discovered multiple violations, to process hundreds of similar charges before full relief can be obtained. See Oatis, supra, 398 F.2d at 498. Congress manifestly did not intend, in passing the 1972 amendments, to cut back on the long established principle that relief for many similarly situated persons may be obtained on the basis of a single charge.^{13/} In sum, the language of the statute, its legislative history, policy considerations and the weight of judicial authority all support the view that the filing of a narrow private suit does not preclude the Commission from bringing a broader

^{13/} Sections 706 and 707, while overlapping, are not redundant. Section 707 suits address a "pattern or practice" of resistance to the full enjoyment of the rights secured by Title VII. Pattern or practice discrimination is discrimination of an exceptional magnitude-- exceptional either by virtue of the number of victims or the number of employment units at which the discrimination occurs. While the line between broad-based and pattern or practice discrimination cannot be drawn with absolute precision, there is certainly a distinction between the two.

suit to redress discriminatory practices uncovered during investigation of a charge.

II

THE RECORD AFFIRMATIVELY SHOWS
THAT THE COMMISSION'S DELAY IN
FILING SUIT WAS ATTRIBUTABLE
TO THE DEFENDANT

Appellant argues that, even if this Court should affirm the ruling of the court below that the Commission was not precluded, by the bringing and settlement of the Ferrell suit, from filing an action against the Company, this Court should hold the action barred by laches. Laches is a defense which depends not merely on a showing of unnecessary delay, but on a demonstration of actual prejudice. EEOC v. North Hills Passavant Hospital, supra, 548 F.2d at 672-74; Cf. EEOC v. Airguide Corp. 539 F.2d 1038, 1042 (5th Cir. 1976). The district court found that the defendant "has not demonstrated any prejudice such as would support a complete defense of laches" (App. 83) but that at most "defendant may be entitled to some mitigation of damages" (App. 84) It noted that there had been a "singularly time-consuming effort first toward conciliation and then toward settlement." Manifestly, that delay was attributable as much to the defendant as to the Commission.

The record affirmatively shows that the Commission's delay in bringing suit after the Ferrell suit was filed was the direct result of defendant's representations that it wished to conciliate further on all issues. The Commission sent the Company a copy of its proposed complaint in January, 1974. At that time, the Company had not answered the Ferrell complaint since its motion for summary judgment in that case was not denied until July, 1974. Had it not been for the Commission's acceptance of defendant's representations that it wished to settle all matters, the Commission suit would have been filed at a time, when, if a court had ruled against the availability of a separate suit, there could have been timely motion for intervention in the Ferrell suit. Instead, negotiations continued throughout 1975, even after the Ferrell suit was settled. While we do not question the defendant's good faith, the fact is that it kept on negotiating until after the Ferrell suit was settled. Under the circumstances, the defendant cannot validly claim that the delay in filing suit was the result of inertia or lack of diligence on the part of the Commission.

Indeed, if this Court should hold that, generally, once a private suit is filed, the Commission is relegated to its right of intervention no matter how

narrow the private suit or how broad the Commission allegations, we think it would be appropriate to hold that such rule should not be applied to this action. As we have pointed out, the Commission was prepared to file suit against the defendant at a time when any ruling against its right to maintain a separate suit would not have prevented a timely motion for intervention in the Ferrell suit. Furthermore, when the Commission notified the defendant that it also intended to sue on the Reese charge (which involved some allegations not arising out of the Ferrell Charge), the Company indicated its desire to negotiate as to all outstanding issues. Negotiations between the Commission and the Company did not conclude until after the Ferrell charge had been settled by the Company. Under the circumstances, the appellant should be deemed estopped from now asserting that the settlement of the Ferrell suit bars the Commission from bringing this action. Equitable estoppel applies when "the party who invokes it shall have acted to his detriment in reliance upon what the other party has done." Helvering v. Schine Chain Theatre, Inc., 121 F.2d 948 950 (2d Cir. 1941) (L. Hand, J). It is not necessary that fraud or misrepresentation be shown to invoke

this equitable principle. United States v. Fidelity & Casualty Co. of New York, 402 F.2d 893 (4th Cir. 1968); Shinaberger v. United Aircraft Corp., 381 F.2d 808 (2d Cir. 1967); Louisville & Nashville Railroad Co. v. Diss-
pain, 275 F.2d 25 (6th Cir. 1960).

American Express, by negotiating with the Commission until after the time for possible intervention in the private suit had passed, should be estopped from now asserting that the Commission suit is barred because it did not intervene in the charging party's action.

CONCLUSION

If the appeal is not dismissed, the judgment of the district court should be affirmed.

Respectfully submitted,

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ATTACHMENTS

SEC. 706. (a) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of the period of reference under subsection (c) or (d), the Commission is unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

BEST COPY AVAILABLE

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

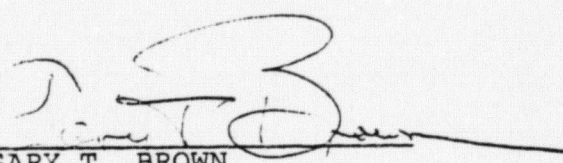
(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief of the appellee and the supplemental appendix with a motion for acceptance and an affidavit, have been mailed this day, postage prepaid, to the following counsel of record:

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